A

## ISHTIAQ AHMAD KHAN v. PP

COURT OF APPEAL, PUTRAJAYA
ABDUL RAHMAN SEBLI JCA
KAMARDIN HASHIM JCA
ZABARIAH MOHD YUSOF JCA
B [CRIMINAL APPEAL NO: B-05(M)-578-12-2017]
30 SEPTEMBER 2019

***CRIMINAL PROCEDURE:*** *Appeal – Appeal against conviction and sentence – Accused convicted for offence of murder and sentenced to death – Whether elements*
C *of murder fulfilled – Whether death of deceased proven – Whether deceased suffered injuries resulting in his death – Whether injuries caused by accused – Whether act by accused came within ambit of one or combination of limbs under s. 300 of Penal Code – Whether conviction and sentence safe – Whether ought to be set aside – Whether accused ought to be acquitted and discharged*

D ***CRIMINAL LAW:*** *Penal Code – Section 300 – Murder – Accused convicted for offence of murder and sentenced to death – Whether elements of murder fulfilled – Whether prima facie case established*

At the High Court, the appellant, a Pakistani national, was found guilty of
E three charges of cheating, an offence under s. 420 of the Penal Code ('PC'), He was accordingly sentenced to one year imprisonment and one whipping for each charge. As a result of investigations, the appellant gave information to the police as per the statements recorded in P37. During interrogations, the appellant told the police officer ('SP21') that he could show a place where
F he had detained a person before that same person was murdered. This led to the discovery of a deceased body. The post-mortem carried out could not determine the deceased's cause of death as his body was in such a highly decomposed state. The appellant was charged at the High Court for murder, an offence under s. 302 read with s. 34 of the PC. The trial judge found that, *inter alia*, (i) the evidence leading to the discovery of the deceased's body was
G properly adduced and was in accord with s. 27 of the Evidence Act 1950 ('Act'); (ii) the circumstantial evidence pointed to the appellant, and a few others still at large, who committed the murder of the deceased; (iii) the death of the deceased was proved by the prosecution; and (iv) the statement recorded in P37 was accepted and admitted as evidence under s. 27 of the
H Act. Satisfied that a *prima facie* case had been established at the end of the prosecution's case, the trial judge called the appellant to enter his defence. The trial judge found that the appellant's defence was a mere denial and his defence of alibi was not supported by the facts. The appellant was convicted of the charge and sentenced to death. Hence, the present appeal. The issues
I that arose for adjudication were whether the trial judge erred in, *inter alia*, (i) holding that the appellant had injured and caused the death of the deceased; and (ii) accepting the oral statements by the appellant as confessions.

**Held (allowing appeal; setting aside conviction and sentence and acquitting and discharging appellant)**
**Per Zabariah Mohd Yusof JCA delivering the judgment of the court:**

**(1)** SP21, in his evidence, said that he had interrogated the appellant after administering a caution on the appellant. However, there was no evidence as to how the caution was administered, in what language it was administered and whether the appellant understood the consequences of the caution. It was also not recorded what was actually said by the appellant to SP21. If it was a confession, surely a trial within a trial ought to have been carried out which, in this case, was not done. Therefore, the trial judge erred in fact and in law when His Lordship accepted, admitted and considered the confession of the appellant to SP21 to make a finding that the appellant had detained the deceased before the murder of the deceased. The trial judge did not evaluate the circumstances surrounding the making of the statement to SP21. As the statement by the appellant was not properly admitted as confession, whatever that was said by the appellant to SP21 was inadmissible. (paras 42, 44 & 46)

**(2)** The trial judge relied on P37 to make a finding that it was the appellant, and a few others still at large, that caused the death of the deceased. As P37 was not admissible, that reliance was no longer valid. There was no admission nor confession of the act of murder of the deceased. At best, P37 only pointed to knowledge. There must be evidence that the appellant committed the act of murder, which in this case, was none. (para 51)

**(3)** The elements that had to be proven by the prosecution for murder were: (i) the death of the deceased ('first element'); (ii) the deceased suffered injuries that resulted in his death ('second element'); (iii) the injuries were caused by the appellant ('third element'); and (iv) the act by the appellant came within the ambit of one or a combination of the limbs under s. 300 of the PC ('fourth element'). What was proven and not in dispute was only the first element, namely that the deceased had died. To prove the second element, it must be proven that the deceased suffered from injuries that resulted in his death. The post mortem carried out could not determine the cause of death and could not ascertain the injuries suffered by the deceased and neither could it be determined what weapon was used to inflict the injury on the deceased. How could a finding be made that deceased died due to the injuries inflicted upon him? (paras 47, 48, 52 & 53)

**(4)** There was no evidence nor findings by the trial judge as to what were the injuries inflicted on the deceased because there was simply no evidence to say so. There was also no evidence that it was the appellant that had inflicted whatever injuries to the deceased. Hence, there were a lot of infirmities in the findings of the trial judge when His Lordship concluded that it was the appellant, and a few others still at large, who committed the act of murder of the deceased. In failing to prove the second and third elements, there was no necessity to go into the fourth element as the prosecution failed to establish a *prima facie* case under s. 300 and the appellant ought to have been acquitted and discharged without defence being called. (paras 54, 55 & 57)

**Case(s) referred to:**
*Alcontara Ambross Anthony v. PP [1996] 1 CLJ 705 FC* ***(refd)***
*Choo Teck Soon v. PP [1953] 1 LNS 16 HC* ***(refd)***
*Md Zainuddin Raujan v. PP [2012] 7 CLJ 715 CA* ***(refd)***
*Pang Chee Meng v. PP [1992] 1 CLJ 39; [1992] 1 CLJ (Rep) 265 SC* ***(refd)***
*Pathmanabhan Nalliannen v. PP & Other Appeals [2017] 4 CLJ 137 FC* ***(refd)***
*PP v. Er Ah Kiat [1965] 1 LNS 136 HC* ***(refd)***
*PP v. Kanapathy Kupusamy & Anor [2001] 1 CLJ 61 HC* ***(refd)***
*PP v. Mohd Farid Mohd Sukis & Anor [2002] 8 CLJ 814 HC* ***(refd)***
*Sandra Margaret Birch v. PP [1977] 1 LNS 114 HC* ***(refd)***
*Soh Ten Seng & Ors v. PP [1964] 1 LNS 188 FC* ***(refd)***
*Wai Chan Leong v. PP [1989] 2 CLJ 1168; [1989] 1 CLJ (Rep) 171 SC* ***(refd)***
*Yee Ya Mang v. PP [1971] 1 LNS 156 HC* ***(refd)***

**Legislation referred to:**
Criminal Procedure Code, ss. 180(1), (3), 271, 277
Evidence Act 1950, ss. 24, 26, 27, 114(g)
Penal Code, ss. 34, 300, 302, 420

*For the appellant - Rajpal Singh & Raja Nur Hanani Raja Abd Rahman; M/s Rajpal, Firah & Vishnu*
*For the respondent - Mohd Dusuki Mokhtar; DPP*

*[Editor's note: Appeal from High Court, Shah Alam; Criminal Trial MTSA No: 45B-196-10-2013 (overruled).]*

*Reported by Najib Tamby*

## JUDGMENT

### Zabariah Mohd Yusof JCA:

**[1]** The appellant is charged as follows:

> Bahawa kamu bersama dengan beberapa orang yang masih bebas lagi pada 5.7.2012 di antara jam 1600 hrs hingga 2300 hrs, di alamat F-2-2A, Blok F, Kedai/Pejabat Taipan 1, Jalan PJU 1A/3N Ara Damansara, Petaling Jaya dalam Daerah Petaling di dalam Negeri Selangor Darul Ehsan, telah membunuh TANG YONG CHING (No. K/P: 671022-01-5885), dan dengan itu kamu telah melakukan suatu kesalahan yang boleh dihukum di bawah Seksyen 302 Kanun Keseksaan dan dibaca bersama Seksyen 34 Kanun Keseksaan.

**[2]** At the close of the prosecution's case, the learned trial judge found that the prosecution had proved a *prima facie* case and called upon the appellant to enter his defence. After hearing the defence case, the learned trial judge found that the defence failed to raise a reasonable doubt on the prosecution's case and made a finding of guilt against the appellant as per the charge. The appellant was convicted and sentence to death by hanging as provided for under s. 277 of the Criminal Procedure Code ('CPC').

**[3]** Aggrieved, the appellant filed an appeal to the Court of Appeal which is the appeal before us. After giving due consideration to the written and oral submissions from both parties, we found that there are merits to the appeal before us. From the evidence, unanimously, we were of the view that the conviction is not safe. We therefore allowed the appeal and acquitted and discharged the appellant of the charge preferred against him. We set aside the conviction and sentence against the appellant.

**[4]** Herein below are the reasons for our decision.

**Background**

**[5]** On 5 July 2012, the wife of the deceased ("SP10") lodged a police report that her husband, the deceased had not returned home the evening before. It was the norm that he usually arrives home around 6.30pm to fetch their son from school.

**[6]** On 7 July 2012, the appellant had used the debit card belonging to the deceased to buy a laptop for RM3,099 at AEON Bandar Utama Damansara. The cashier at AEON ("SP4") became suspicious as the name on the debit card bore a Chinese name whilst the appellant does not look Chinese. SP4 contacted her supervisor ("SP2") informing her that the appellant was using a card belonging to a Chinese man. SP2 subsequently contacted RHB Bank telling them that the appellant was attempting to use a debit card belonging to someone else. Before RHB Bank could reply, the appellant protested and insisted for the debit card to be returned back to him. As a result, SP2 called upon security ("SP3"). The appellant attempted to climb over the counter but it was too high and the appellant was apprehended by the security and he was detained in a room whilst waiting for the police to arrive. Subsequently, the appellant was brought to the police station at Bandar Utama where he was arrested.

**[7]** The appellant was charged under s. 420 of the Penal Code ("PC") with three charges of cheating for the following acts, namely:

(i) attempting to buy a laptop at AEON at Bandar Utama;

(ii) purchased goods at RM32.85 at Tesco Mutiara Damansara; and

(iii) purchased goods at RM1,499 at Tesco Mutiara Damansara.

A **[8]** The appellant pleaded guilty to the cheating charges and was sentenced to one year imprisonment and one whipping for each charge. The imprisonment sentences were to run concurrently.

**[9]** As a result of police investigations, the appellant allegedly gave information to the police as per the statement recorded in P37 to the police
B officer ("SP16"). Subsequently, the appellant brought the police to the discovery of a body of the deceased. The science officer ("SP18") from the Jabatan Kimia, Petaling Jaya who did the DNA analysis on the DNA samples confirmed that the deceased is Tang Yong Ching, the husband to SP10.

C **[10]** The body of the deceased was brought to Hospital Kuala Lumpur. Dr Mohd Shah bin Mahmud ("SP11") who conducted the post-mortem said that the body was in such a high decomposed state and hence SP11 could not ascertained the cause of death of the deceased. Hence, the cause of death is undetermined. The report of the post-mortem is as per P28.

D **[11]** The police upon investigation found that the appellant together with few others who are at large had caused the death of the deceased. Subsequently, a charge under s. 302 of the PC read together with s. 34 of the same was preferred against the appellant.

E **The Findings Of The Learned High Court Judge**

**[12]** The learned trial judge found that the evidence of the prosecution witnesses are credible and they are truthful witnesses. Their evidence are relevant and they corroborated each other (refer to para. 36 of the grounds of judgment).

F **[13]** It was also the findings of the learned trial judge that the evidence leading to discovery was properly adduced and was in accord with s. 27 of the Evidence Act 1950 ("EA") (refer to para. 37 of the grounds of judgment).

**[14]** The learned trial judge also held that the circumstantial evidence
G points to the appellant and few others who are still at large who committed the murder of the deceased under s. 302 read together with s. 34 of the PC (refer to para. 38 of the grounds of judgment). There was however no elaboration as to what were the circumstantial evidence that the learned trial judge was referring to.

H **[15]** The learned trial judge found that the first element, namely the death of the deceased was accordingly proved by the prosecution. The DNA profile obtained from the son of the deceased matched with the DNA of the deceased.

**[16]** The learned trial judge also said in his findings as follows at para. 46
I of his grounds:

Mahkamah juga berpuashati daripada kenyataan yang diberikan oleh Tertuduh kepada SP 16 Eksibit P37 yang membawa pada penemuan mayat simati membuktikan bahawa Tertuduh dan beberapa orang lagi telah melakukan kecederaan pada simati yang boleh menyebabkan kematian. Keterangan mengikut keadaan menjuruskan sedemikian atau dalam keadaan biasa boleh menyebabkan kematian (*Jayaraman & Ors v. PP* [1982] 2 MLJ 306, *Pathmanabhan v. PP* [2017] 4 CLJ 137).

**[17]** The learned trial judge accepted statements as recorded in P37 and admitted it as evidence under s. 27 of the EA as he was of the view that the requirements to admit statements under the said section were fulfilled, namely:

(i) the information was supplied by the appellant (see *PP v. Er Ah Kiat* [1965] 1 LNS 136; [1966] 1 MLJ 9, *Choo Teck Soon v. PP* [1953] 1 LNS 16; [1954] 1 MLJ 63, *PP v. Kanapathy Kupusamy & Anor* [2001] 1 CLJ 61; [2001] 5 MLJ 20);

(ii) the appellant was in police custody (see *Soh Ten Seng & Ors v. PP* [1964] 1 LNS 188; [1964] MLJ 380);

(iii) the information supplied by the appellant has caused the discovery (see *Wai Chan Leong v. PP* [1989] 2 CLJ 1168; [1989] 1 CLJ (Rep) 171; [1989] 3 MLJ 356, *Yee Ya Mang v. PP* [1971] 1 LNS 156; [1972] 1 MLJ 120, *Sandra Margaret Birch v. PP* [1977] 1 LNS 114; [1978] 1 MLJ 72, *Md Zainuddin Raujan v. PP* [2012] 7 CLJ 715);

(iv) the fact or thing discovered was, as a result of the information must be concealed;

(v) the police had no prior knowledge of the fact or things concealed (see *PP v. Mohd Farid Mohd Sukis & Anor* [2002] 8 CLJ 814); and

(vi) this meant that the appellant understood the language used by SP16, ie, Bahasa Melayu and simple English.

**[18]** The learned trial judge also said in his grounds:

Mahkamah ini menerima pakai keputusan kes *Pathmanabhan v. PP* [2017] 4 CLJ 137 mengenai fakta ini

without elaborating as to what he meant by that statement in his grounds.

**[19]** His Lordship further made the following findings:

[49] Mahkamah berpandangan intipati 2 dan 3 juga telah dibuktikan oleh pendakwaan. Mahkamah juga menerima **pengakuan** Tertuduh kepada SP21 **bahawa Tertuduh dan yang lain mengurung simati sebelum simati dibunuh.**

A [50] **Mengenai intipati** 4 dan fakta keadaan kes, adalah jelas bahawa **Tertuduh dan beberapa orang lagi yang masih bebas melakukan pembunuhan tersebut secara niat bersama menurut s. 34 KK.** Notis alibi Tertuduh tidak dapat menyangkal pendakwaan bahawa dia tidak berada ditempat kejadian seperti dalam pertuduhan pada masa material.

(emphasis added)

B **[20]** At the end of the prosecution's case, after giving the prosecution's case a maximum evaluation, the learned trial judge found that the prosecution had proved a *prima facie* case as required under s. 180(1) and (3) of the CPC against the appellant. The appellant was thus ordered to enter his defence.

C **[21]** The appellant opted to give his defence under oath and called three witnesses (inclusive of the appellant). The learned trial judge found that the defence was a mere denial and his alibi defence was unsupported with facts and the learned trial judge doubted the same. Magna Prima was not called to confirm that the appellant was working with Magna Prima at the material time.

D

**[22]** As to the evidence of the three witnesses for the defence, the learned trial judge in his judgment said that from the demeanour of the witnesses, he was not convinced that they were truthful witnesses. The learned trial judge had made notations as to this in the notes of proceedings in accordance to

E s. 271 of the CPC. The evidence of SD2 and SD3 did not assist the appellant as their evidence were mere hearsay.

**[23]** On the issue of the signature of the appellant on P37 which was allegedly not the same as the official signature of the appellant as can be seen in IDD41, the learned trial judge accepted the signature of the appellant in

F P37 as the appellant had admitted that it was his signature on P37.

**[24]** The learned trial judge again said at para. 62 of his grounds that "Keterangan mengikut keadaan menunjukkan tertuduh dan beberapa orang lagi yang masih bebas melakukan kesalahan membunuh simati (kes *Pathmanabhan Nalliannen v. PP & Other Appeals* [2017] 4 CLJ 137 diikuti)".

G The same statement again was repeated at para. 65 of the grounds.

**[25]** The learned trial judge found at the end of the defence's case that the prosecution had proved its case beyond reasonable doubt and proceeded to convict the appellant under s. 302 read with s. 34 of the PC and sentenced

H him accordingly.

**The Issues Raised By The Appellant In This Appeal**

**[26]** The submission by the appellant raised the following issues, namely that the learned trial judge erred when:

I (i) the held that the appellant had injured and caused the death of the deceased;

(ii) he accepted that the oral statements made by the appellant as confessions; and

(iii) he made no directions when he failed to invoke adverse inference under s. 114(g) of the EA when the prosecution failed to call Hafiz Md Tariq as a prosecution's witness.

**Our Findings**

**[27]** From para. 46 of the grounds of the learned trial judge, it appear that the learned trial judge had relied on:

(i) the statements recorded in P37; and

(ii) circumstantial evidence,

in making his findings that the act of the appellant and few others who are at large, had caused the death of the deceased.

**[28]** P37 is the questions and answers between SP16 (DSP Koh Jok Tian) and the appellant which purportedly led to the discovery of the deceased's body and the car used to transport and throw the body of the deceased. The relevant part of P37 is reproduced herein below:

S: Dimanakah lelaki cina itu sekarang?

J: Lelaki cina tersebut telah mati dan mayatnya telah dibuang di sebuah kaw semak di kaw Damansara. Saya boleh tunjukkan tempat tersebut.

S: Bagaimana mayat lelaki itu boleh dibawa ke Tempat tersebut untuk dibuang?

A: Mayat tersebut dibawa dengan menggunakan kereta Toyota Innova warna silver miliknya.

The learned trial judge had admitted P37 under s. 27 of the EA (refer to para. 47 of the grounds) as he was satisfied that the requirements of s. 27 of the EA had been fulfilled.

**[29]** Was the learned trial judge correct in admitting P37 under s. 27 of the EA? The prosecution submitted that from the testimony of SP16 who recorded the so-called information that led to the discovery of the body, the learned trial judge was correct in admitting P37 under s. 27 of the EA. Although there were allegations that the appellant was forced or beaten in showing the place of the body, these are bare allegations without proof to substantiate.

**[30]** The law as it stands, the fact that the appellant was forced or beaten would not invalidate any statement admitted pursuant to s. 27 of the EA. As far as s. 27 is concerned, the law does not require that the statement must be voluntarily given. Hence, there is no requirement of a *voire dire* or a trial within a trial to determine as to its admissibility. So long as it fulfilled the requirements that:

A (i) the information is supplied by the appellant;

(ii) the appellant is in police custody;

(iii) the information supplied by the appellant has caused the discovery;

(iv) the fact or thing discovered as a result of the information must be
B concealed; and

(v) the police have no prior knowledge of the fact or things concealed.

**[31]** In the instant appeal before us, the learned trial judge found that all the aforesaid requirements had been fulfilled.

C **[32]** Our view is that the prosecution failed to establish that the requirements of s. 27 of the EA had been fulfilled for the following reasons.

**[33]** The information supplied by the appellant as can be discerned from P37 is:

D Lelaki cina tersebut telah mati dan mayatnya telah dibuang di sebuah kaw semak di kaw Damansara. Saya boleh tunjukkan tempat tersebut.

The fact shows that after this information was given by the appellant, it led to the discovery of the body by the police.

E **[34]** The defence argued that the forensic team received the instruction from the investigation officer at 1.30pm, earlier than the time the interrogation team interrogated the appellant, which the defence contended, was at 2.30pm on 12 July 2012. In this regard reference is made to P42 (AR Vol. 3B, at p. 155) which is the "lapuran pemeriksaan tempat kejadian". The time which is stated as in item 9 of P42 as the "tarikh/masa
F dimaklumkan" is "12/07/12 - 1330 hrs" which is 1.30pm. The defence argued that the investigation took place at 2.30pm from the evidence of SP16 (at p. 148 of RR Vol. 3B) when he said he interrogated the appellant at 2.30pm. This, according to the defence shows that the police knew of where to search for the body of the deceased before the appellant told SP16 that he
G will show the body of the deceased. Hence, this would mean that it was not a discovery but a recovery. Section 27 of the EA thus would not be applicable.

**[35]** However, it was submitted by the prosecution that the evidence does not reflect as submitted by the defence. The forensic team was told to standby
H at 1.30pm. This can be seen from the notes of proceedings (at p. 187 of the AR Jilid 2C) which is the evidence of Detektif Sarjan Mohamed Anwan bin Ahmad Tarmizi ("SP17") who said that on 12 July 2012, he was instructed by the investigating officer, Insp Shariman in this case to standby to await instruction from Insp Shariman and such instruction was received by him at
I 1.30pm. The time 1.30pm was the time SP17 and his team was told to be on standby. At p. 189 of the same volume in the AR, the evidence showed

that SP17 and his team went to the police station at Petaling Jaya on 12 July 2012 at 2.15pm and from there they await for further instructions. At 4.15pm the team was instructed to go to police station at Ara Damansara in which they arrived at 4.35pm (pp. 189 and 190 of the AR, vol. 2C). At the police station at Ara Damansara, SP17 said that the forensic team was already there. They were then instructed to proceed to the place where the body of the deceased was discovered. The notes of proceedings at p. 190 state that the team arrived at the place where the body was discovered at 5.15pm.

**[36]** From the aforesaid timings, we found that the police and the forensic team went to the place where the body was discovered after interrogation of the appellant and not before interrogation, as contended by the defence. Hence, the allegation that the discovery was made before the information given by the appellant to SP16 has no merit.

**[37]** There was an issue raised by the defence that for s. 27 of the EA to bite, the actual words used by the appellant must be recorded *verbatim*. The defence submitted that looking at P37 and the fact that the appellant is a foreigner, it is highly unlikely that the appellant had given the answer as in the language as recorded in P37. It is trite law that any answer by an accused person which is information that leads to discovery must be recorded in the precise words uttered by the accused person. Further, it was also alleged that the signature in P37 was not that of the appellant's. There was also no interpreter present to ensure that the appellant understood the effect of him giving the statement to the police.

**[38]** The law pertaining to the admission of statements recorded under s. 27 of the EA is that, given that s. 27 is an exception to the rule on confession, the requirements must be strictly adhered to, before it can be admitted as evidence. The court must be vigilant before admitting whatever information allegedly given to the police that leads to discovery. Therefore, the exact words used by the accused person must be shown and adduced to the court before it can be admitted under s. 27. In *Pang Chee Meng v. PP* [1992] 1 CLJ 39; [1992] 1 CLJ (Rep) 265; [1992] 1 MLJ 137 where Abdul Hamid Omar LP reminded the courts of the need for vigilance "to ensure the credibility of evidence by the police personnel in respect of this section, (that is, s. 27) which is so vulnerable to abuse".

**[39]** Coming back to our appeal, it is in evidence by SP16 that when he recorded the so-called information and answers by the appellant to his questions to the appellant on 12 July 2012, he said that he did not record the answers in *verbatim*. This can be seen from the notes of proceedings when SP16 was cross-examined by the defence counsel at p. 173 of AR, vol. 2B:

A: Percakapan ini saya **olah** dari percakapan awal yang saya buat. Tak mungkin saya akan tulis semua catatan dalam repot ini.

Q: So you setuju dengan saya itu perkataan dalam P38 (sic) bukannya semua digunakan oleh tertuduh. Setuju?

A: Maksud yang sama.

Q: No, tapi bukan perkataan yang sama yang digunakan oleh dia.

A: **Ya, Saya sudah olah. Setuju.** (emphasis added)

**[40]** It is clear that the answers by the appellant as recorded in P37 are not the exact words used or *verbatim* by the appellant. Therefore, the court is deprived of the benefit of evaluating the exact words used by the appellant to determine whether the appellant did give information that led to the discovery of the fact ie, the body as stated under s. 27. Words that had been reworded ('diolah') by the recording officer, SP16 may not bear the meaning assigned to the words used by the appellant when he answered the questions by SP16. Therefore, it is in the interest of justice that the exact words used by the appellant be adduced or presented to the court as evidence for the court to make a determination as to whether it falls squarely as information given by the appellant that led to the discovery of the body of the deceased. This issue has not been addressed by the learned trial judge before he admitted the statements recorded in P37 under s. 27 of the EA. We are of the view that the learned trial judge had erred when he admitted P37. On the issue of signature of the appellant, this is no longer relevant in view that the statement in P37 was wrongly admitted by the learned trial judge.

**[41]** The learned trial judge further admitted a confession allegedly made to SP21 when he said that:

> [4] ... Mahkamah juga menerima **pengakuan** Tertuduh kepada SP21 bahawa Tertuduh dan yang lain mengurung simati sebelum simati dibunuh. (emphasis added)

**[42]** SP21 (ASP Tan Woon Lee) in his evidence said that he had interrogated the appellant on 13 July 2012 after administering a caution on the appellant. Subsequently, due to the interrogation by SP21, the appellant allegedly told SP21 that he could show a place in Ara Damansara which is an office shop lot where the appellant had detained the deceased before he was murdered (p. 285 of AR, vol. 2D). There was no evidence as to how the caution was administered and in what language it was administered and whether the appellant understood the consequence of the caution. It was also not recorded what was actually said by the appellant to SP21. If it was a confession, as was held by the learned trial judge, surely a trial within a trial ought to have been carried out, which in this case was not done. How was voluntariness determined? What was the confession? Was the confession admitted as evidence? All the parties appeared to have missed the point.

There was evidence that the appellant was interrogated for 13 days by the Bukit Aman police team before he was interrogated by SP21 (refer to p. 297 of AR, Vol. 2D), hence, voluntariness of the so-called "confession" is surely an issue. The learned trial judge did not address this in his grounds. The defence counsel had raised the fact that the appellant was already tired when he allegedly gave information under s. 27 of the EA that led to the discovery of the body of the deceased and the car that brought the body to the place where it was dumped. This interrogation by SP21 was one day after the s. 27 information was purportedly given. Therefore, this confession to SP21 was never addressed by both parties and the learned trial judge in his grounds, except to say in his grounds that he had accepted the appellant's confession. At which point was the confession admitted by the learned trial judge. There was nothing reflected in the notes of proceedings to show:

(i) what was the caution administered to the appellant before he uttered the confession?;

(ii) in what language was the caution read to the appellant and did he understood the consequences of the caution?;

(iii) what was the confession uttered by the appellant to SP21?;

(iv) where was the confession recorded?;

(v) did the appellant verified the confession made?;

(vi) was it voluntarily made?; and

(vii) if not, why was a trial within a trial not conducted?

**[43]** Clearly, there was no objection raised by the defence when SP21 said that the appellant had informed him of the "confession". The court had clearly erred when it accepted this inadmissible evidence, despite no objection raised by the defence at that stage. We find support in the decision of the Federal Court in *Alcontara Ambross Anthony v. PP* [1996] 1 CLJ 705 where the Federal Court held that:

> [8] The Court below had also erred when it admitted irrelevant, inadmissible and highly prejudicial evidence, more particularly that part of the testimony of ASP Abdul Wahab where he gave an account of the briefing he had given his men before mounting the road block in question. His statement that "I informed them (his men) that information had been received that a certain Indian would be travelling in a blue Colt Galant Mitsubishi WBE 2789 and transporting dadah proceeding from Kawasan Permatang Bendahari towards Pulau Pinang" was clearly based on hearsay, was prejudicial to the appellant and therefore inadmissible. Although no objection had been raised to the admission of this inadmissible evidence, the Judge was nevertheless under an automatic duty to stop it from being adduced. Inadmissible evidence does not become admissible by reason of failure to object. Although the Judge had not referred to this part of ASP Abdul Wahab's testimony in his judgment, the possibility that he was swayed by it could not be ruled out.

**[44]** Hence, it is our finding that the learned trial judge had erred in fact and in law when His Lordship held that he accepted, admitted and considered the confession of the appellant to SP21 to make a finding that the appellant had detained the deceased before the murder of the deceased. The learned trial judge did not evaluate the circumstances surrounding the making of the statement to SP21 (ss. 24 and 26 of the EA referred).

**[45]** SP21 said that "Dia (the appellant) cuma memberitahu dia boleh tunjuk satu tempat di kawasan Ara Damansara iaitu satu kedai pejabat di mana dia telah mengurungkan si mati di kawasan itu sebelum dibunuh". Even taking this statement at its highest, it does not point to the fact that it was the appellant that had committed the act of murder of the deceased. At most it indicated knowledge on the part of the appellant that he knew that the deceased was detained in the office shop lot before the deceased was murdered. That is not confession that he committed the act of murder.

**[46]** As the statement by the appellant to SP21 was not properly admitted as confession, we found that whatever that was said by the appellant to SP21 was inadmissible. Clearly, the learned trial judge had misdirected himself when he accepted the statements made to SP21 as a confession.

**[47]** Absent P37 and the confession to SP21, what is left as evidence to prove the charge? The elements that have to be proven by the prosecution for murder are:

(i) the death of the deceased;

(ii) the deceased suffered injuries that resulted in his death;

(iii) that the injuries were caused by the appellant; and

(iv) the act by the appellant comes within the ambit of one or a combination of the limbs under s. 300 of the PC.

**[48]** What has been proven and not in dispute is only the first element, namely that the deceased had died.

**[49]** As for the second element and the third element, the learned trial judge held that it had been proven by the prosecution (refer to para. 49 of the grounds).

**[50]** The defence submitted that the learned trial judge erred in fact when he decided that the appellant had injured and caused the death of the deceased. We found that this submission by the defence has merits for the following reasons.

**[51]** Firstly, the learned trial judge relied on P37 to make a finding that it was the appellant and few others, who are at large that caused the death of the deceased. As P37 is not admissible, that reliance is no longer valid. Neither can it be said that the appellant had made confession that he and few others had detained the deceased before he was murdered, as that so-called

confession is also inadmissible. Even looking at the so-called confession, (assuming that it is admissible, which we had determined that it is not), taking it at its highest, at best it was only the detention of the deceased that was admitted. There was no admission nor confession of the act of murder of the deceased. Similarly, with the statement in P37 which was admitted by the learned trial judge under s. 27 of the EA, taking it at its best (assuming that is was properly admitted under s. 27 of the EA), it only points to knowledge. There must be evidence that the appellant committed the act of murder, which in our present case, that there is none.

**[52]** To prove the second element, it must be proven that the deceased suffered from injuries that resulted in his death. The evidence of SP11, Dr Mohd Shah bin Mahmud, who conducted a post-mortem on the body of the deceased confirmed that due to the heavy state of decomposition of the body of the deceased, examination of the interior and exterior parts of the body could not determine the cause of death. For clarity, we reproduced his evidence:

Q: Berdasarkan kepada pemeriksaan luaran dan dalaman kepada jasad si mati ini, boleh doktor beritahu mahkamah punca kematian dalam kes ini?

A: Disebabkan mayat terlalu reput, hasil pemeriksaan luaran dan dalaman tidak dapat menentukan punca kematian sebenar.

Q: Dan berdasarkan pemeriksaan doctor ke atas jasad si mati ini boleh doktor mengenal pasti bahagian kecederaan si mati dalam kes ini?

A: Disebabkan pembusukan lanjut, agak sukar. Berdasarkan hasil luaran ada kemungkinan kecederaan pada bahagian leher sahaja disebabkan ada rongga yang telah dibesarkan oleh ulat-ulat. Saya tidak pasti, tapi ada kemungkinan kerana pertama mayat sudah reput dan ada gangguan oleh ulat-ulat.

Q: Samada doktor boleh pastikan apakah senjata yang digunakan di bahagian kecederaan di jasad si mati tersebut?

A: Berdasarkan hasil bedah siasat saya tidak dapat menentukan sebab mayat terlalu reput dan pembusukan lanjut.

**[53]** SP11 could not ascertained the injuries suffered by the deceased and neither can he determined what weapon was used to inflict the injury on the deceased. As SP11 could not ascertained the cause of death or the injuries suffered by the deceased that lead to his death, how could a finding be made that the deceased died due to the injuries inflicted upon him.

**[54]** The learned trial judge's finding on the third element that it was the appellant and few others that had caused the death of the deceased is also erroneous, premised on the evidence of SP11. In the first place, there was

A no evidence nor findings by the learned trial judge as to what were the injuries inflicted on the deceased because there is simply no evidence to say so. There was also no evidence that it was the appellant that had inflicted whatever injuries to the deceased.

B **[55]** Hence, there are a lot of infirmities in the findings by the learned trial judge when he concluded that it was the appellant and few others who were still at large, that committed the act of murder of the deceased.

C **[56]** In fact, it was also in evidence by SP11 that there is a possibility that the deceased committed suicide or even had a heart attack. The learned trial judge failed to take into account these other possibilities as testified by SP11, given that he could not ascertain the cause of death and neither could he ascertained the nature of the injury suffered by the deceased.

D **[57]** In failing to prove this second element and the third element, there is no necessity to go into the fourth element, as the prosecution had failed to establish a *prima facie* case under s. 300 of the PC and the appellant ought to have been acquitted and discharged for the offence of murder without defence being called.

**Failure To Invoke Section 114(g) Of The EA When The Prosecution Failed To Call Haziq Md Tariq As A Prosecution Witness**

E **[58]** It was submitted by the defence that the learned trial judge had erred when he did not direct his mind when the prosecution failed to call Hafiz Md Tariq as a witness. It was submitted that Hafiz Md Tariq is a material witness as he was heavily involved with the case. He was arrested as one of the suspects and his statements were recorded. The investigation officer F ("SP22") confirmed that Hafiz Md Tariq was staying together with the appellant as well as Shahid. The defence submitted that this failure by the prosecution to call Hafiz Md Tariq has created an adverse inference against the case for the prosecution entitling the court to invoke the adverse inference under s. 114(g) of the EA.

G **[59]** However, a perusal of the notes of proceedings especially the cross-examination on the investigation officer, SP22 (from pp. 348 to 351 of AR, Vol. 2D) wherein the defence suggested that it was Hafiz Md Tariq who informed the appellant as to what actually happened from beginning until the killing of the deceased and who were actually involved. These suggestions H were denied by SP22. Suggestions or put questions does not amount to evidence. Since it was the defence that suggested that it was Hafiz Md Tariq who informed the appellant as to what happened and who killed the deceased, then it lies on the defence to prove such suggestions.

I

**[60]** Therefore, it is erroneous to submit that an adverse inference under s. 114(g) of the EA should have been invoked against the prosecution for failure to call Hafiz Md Tariq as a witness, as it has not been established by the defence that such failure by the prosecution in calling Hafiz Md Tariq had created a gap in the prosecution's case.

**Other Issue**

**[61]** Although the charge against the appellant was to be read together with s. 34 of the PC, parties did not address us on this point and neither was it raised in the petition of appeal. Hence we find it unnecessary to address the same.

**Conclusion**

**[62]** As we found that the prosecution failed to prove the second and the third element of s. 300 of the PC, which means that the prosecution failed to prove a *prima facie* case against the appellant at the end of the prosecution's case. Therefore, we found that it is unnecessary for us to proceed with evaluating the defence of the appellant.

**[63]** We therefore allowed the appeal by the appellant. The conviction and sentence against the appellant are hereby set aside. The appellant is acquitted and discharged from the charge under s. 302 of the PC read with s. 34 of the same.